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Lucky they didn't work federally

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Relic-like laws would have prevented justice being served.

Kieran Pender, John Wilson

THE question of whether and how employers should be permitted to consider past criminal convictions in the hiring process is a vexed one.

On one hand, rehabilitation is a key purpose of the justice system, and once someone has served their sanction - whether a fine, a term of imprisonment or somewhere in between - they should not face ongoing punishment. Famously, an early governor of NSW appointed two emancipated convicts as colonial magistrates.

On the other hand, employers may be wary of employing workers who have committed criminal offences - particularly where the offence is serious or involves dishonesty.

A bank branch might worry about employing a former thief; someone convicted of child sex offences would not be an appropriate recruit for a role working with children. It is perhaps understandable that employers are increasingly requiring criminal record checks, or disclosures, as part of the recruitment process.

But particularly for lesser offences, and where much time has passed since the conviction, it becomes increasingly problematic for prospective employees to face discrimination on the basis of their past misconduct. It is for this reason that every Australian state and territory has a spent conviction legislation. In the ACT, for example, offences committed as an adult are automatically spent - no longer liable to be disclosed - after 10 years.

There are some exceptions, including sexual offences and offences involving more than six months' imprisonment. Some jurisdictions - notably the ACT, Tasmania and the Northern Territory - also make it unlawful to discriminate against someone on the basis of prior criminal convictions.

Such schemes, including the Discrimination Act in the ACT, typically operate in

relation to an "irrelevant criminal record".

Late last year, these issues came to a head in Complainant DT232023 v Community Services Directorate, with the ACT Civil and Administrative Tribunal ordered the territory government to pay over a quarter of a million dollars in damages to a public servant. It is an instructive case.

The applicant had experienced a challenging childhood, including neglect and abuse by parents with substance addictions. As a young adult she had entered a relationship involving domestic violence, and during this time committed a number of offences, including drug-related offences. Most of the offences occurred over a decade ago, during that relationship; there were a few more recent misdemeanours.

In 2021, the applicant was employed by the territory government, after fully disclosing her criminal record. In 2023, though, a search warrant was executed at the applicant's home - as part of an investigation into another person.

The police noticed a government laptop on the premises, and alerted the ACT Integrity Commission "in case she had not been frank as to her criminal record."

The commission then wrote to the Community Services Directorate. The directorate immediately removed the applicant from active work and access to its systems, placed her on gardening leave until the end of a temporary contract, and declined to renew her employment. To make matters worse, the applicant had been accepted for a role at CIT, who subsequently withdrew the offer.

The tribunal held that the government had unlawfully discriminated against the applicant on the basis of an irrelevant criminal record. The tribunal criticised the "knee-jerk reaction", noting a failure to consider the wider circumstances or give the applicant an opportunity to make her case.



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"To determine if a criminal record is irrelevant an employer must consider all the circumstances surrounding the applicant's employment," held the tribunal senior member, Lea Drake. "In this case, some of those factors would have included the respondent's previous determination to employ her with her acknowledged criminal record, her satisfactory performance to date and the absence of any acts of dishonesty during her employment ... Also, her personal circumstances."

The fact that the Integrity Commission had referred the matter, following the police raid, did not add anything to the required analysis - the tribunal held that the directorate could not somehow "delegate" determination of whether the criminal record was relevant. In a subsequent decision, the Tribunal ordered the government to pay \$265,372.87 in compensation.

Complainant DT232023 is a reminder of the legal risk faced by employers in the ACT who discriminate against prospective or current employees on the basis of an irrelevant criminal record. Unfortunately for federal public servants, and those in other jurisdictions (apart from the Northern Territory and Tasmania), protection is less robust.

Irrelevant criminal record discrimination is not expressly unlawful under federal law. The Australian Human Rights Commission has jurisdiction to conciliate, and investigate, discrimination on the basis of an irrelevant criminal record, but any ultimate conclusion or recommendation of the commission is unenforceable - unlike, say, sex discrimination, which can be litigated.

At the APS level, there is also the question of security clearances and AusCheck screening. The Public Service Act expressly permits the engagement of a federal public service to be conditional on "security and character clearances", and as we have written about previously, it is very difficult (although not impossible) to overcome an adverse assessment. The status quo, where private sector and territory employees in Canberra are protected against this form of discrimination, while federal public servants are not, does seem unsatisfactory.

The federal Human Rights Commission has for some time now been advocating for reform to regularise its jurisdiction of criminal record-related complaints. The Australian Law Reform Commission recommended such reform as far back as 1987; more recently, in 2018 the then-head of the Human Rights Commission described the current limited protection as a "relic" and called for change. Complainant DT232023 underscores the anomalous present position. Had the applicant been a federal public servant, and experienced similar mistreatment, she would have few legal options. As she was a territory public servant, justice was done. Now time for federal legislators to do the same.

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In many cases, a criminal record shouldn't preclude you from employment. Picture Shutterstock